IN THE HIGH COURT OF PUNJAB AND HARYANA AT

CHANDIGARH

Criminal Appeal No. 1147-SB of 2005
Date of decision: 26.09.2007

Nirmal Singh alias Nimmi .....*Appellant*

Versus

The State of Punjab .....*Respondent*

CORAM: HON'BLE MRS. JUSTICE NIRMAL YADAV

Present: Mr. S.S. Gill, Advocate
for the appellant

Mr. P S Grewal, A.A.G., Punjab
for the respondent-State

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Order:

Appellant-Nirmal Singh alias Nimmi has challenged the judgement of conviction and order of sentence dated 16.05.2005 passed by the Special Judge, Sangrur, convicting accused-appellant under Section 15 of of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short, the Act) and sentencing him to undergo rigorous imprisonment for a period of ten years and imposing a fine of Rs.1 lac and in default of payment of fine to further undergo rigorous imprisonment for two years.

The case of the prosecution, in brief, is that on 01.01.1998, police party headed by ASI Sukhkirpal Singh (PW4) in the official vehicle

bearing registration No. PB-13B-1582, was going for patrolling. When they reached in the area of canal minor of village Bhatian Kalan, a person was seen sitting on three gunny bags on the passage of canal minor. On suspicion, he was apprehended. He was given an option of getting his search conducted by some Gazetted Officer or a Magistrate. He expressed his desire to be searched by some Gazetted Officer, vide statement EX PE. Accordingly, Rajbachan Singh, DSP, Dhuri was called at the spot. The Investigating Officer is stated to have made efforts to join independent witness, but nobody was available. On the direction of Rajbachan Singh, DSP, the Investigating Officer opened and checked the three gunny bags, the contents of which were found to be poppy husk. Out of these gunny bags, two samples of 250 grams each were separated and remainder contraband was weighed with the help of spring scale. Each bag was found to be contain 29 kgs. 500 grams poppy husk. From all the bags, total 88 kgs 500 gms. poppy husk was recovered. All the six samples were made into parcels separately. The sample parcels as well as the bags were sealed with the seal of ASI Sukhkirpal Singh bearing impression 'SS'. Sample seal was prepared separately, vide EX P-1, which was verified by DSP. All the articles were taken into possession, vide recovery memo EX. PC, attested by DSP Rajbachan Singh, HC Paramjit Singh and C-1 Narinder Singh. Ruqa, Ex PF, was sent to the police station, Dhuri, on the basis of which formal first information report EX PF/1 was recorded. Rough site plan, EX. PG with regard to place of search and seizure was prepared with correct marginal notes. As per report of Chemical Examiner, EX.PJ , the contents of

samples were found to be poppy husk. On completion of the investigation, challan was presented in the court of Illaqa Magistrate *and* the case was committed for trial to the Court of Sessions Judge, Sangrur, who entrusted the same to the Court of Special Judge, Sangrur. The accused was charge sheeted under section 15 of the Act, to which he pleaded not guilty and claimed trial.

In order to prove its case, the prosecution examined HC Pritpal Singh (PW1), HC Nirbha Singh (PW2) both of them submitted their affidavits EX PA and EX. PB respectively, PW3 DSP-Rajbachan Singh, PW4 Sukhkirpal Singh, the Investigating Officer, PW-7 HC-Paramjit Singh, recovery witnesses and PW-5 Rajwinder Singh, SHO, Police Station Amargarh, who verified the investigation and interrogated the accused and after his satisfaction put his seal on all the parcels containing the samples as well as the remainder. He also attested the sample seal, EX P-1. The case property was deposited with the MHC Pritpal Singh.

When examined under Section 313 Cr.P.C., the accused pleaded false implication. According to him, he was arrested from his house in the presence of his wife and Rs.3,000/- were snatched from him. In defence, he examined DW1 Constable Jagtar Singh, who stated that as per record, ASI Sukhkirpal Singh was drawing his salary as Head Constable. He was working as ASI/ORP (own rank promotion). He produced his salary certificate and copy of the relevant entry in the service book vide EX D-1 and Ex D-2, respectively.

Learned trial Court, after taking into consideration the facts and

evidence on record held the accused to be guilty of keeping 90 kgs. poppy husk without any licence or permit, thereby convicted and awarded sentence as mentioned in Para-1 of the judgement.

I have heard learned counsel for the parties and have gone through the material on record.

Learned counsel for the appellant at the outset argued that PW-4 ASI Sukhkirpal Singh, was not competent to investigate the case under the Act, as he was holding the substantive rank of Head Constable only and was working as ASI on Own Rank Promotion. He produced salary certificate EX D-1 and copy of relevant entry in the service book EX D-2, issued by the Senior Superintendent of Police, Sangrur. As per Ex D-2, salary of Sukhkirpal Singh, the I.O. was fixed in the rank of Head Constable. Learned counsel referred to the Notification No. S.O. 33/C.A.61/85/Ss. 42 and 67/87 dated 3rd September, 1987, according to which, an officer above the rank of Assistant Sub Inspector of Police is competent to exercise the powers and perform the duties as specified in Sections 42 and 67 of the Act within the areas of their respective jurisdiction. Accordingly, the entire proceedings undertaken by the Investigating Officer (Sukhkirpal Singh) are without jurisdiction.

It is further argued that the Investigating Officer has failed to comply with the provisions of Sections 55 and 57 of the Act. He further pointed out that even the testimony of all the recovery witnesses i.e. PW3, PW4 and PW7 suffer from serious discrepancies and contradictions. No independent witnesses was joined at the time of search and seizure of the

alleged contraband. The time of recovery is stated to be around 9 or 10 A.M. Both, PW-3 DSP Rajbachan Singh and PW-4 Sukhkirpal Singh, the Investigating Officer stated that they did not try to join any independent witnesses on their way from Dhuri. Learned counsel further pointed out that as per the Investigating Officer, he reached the place of occurrence at about 9.00 P.M. and left at about 11.30. P.M. On the other hand, PW-3 DSP Rajbachan Singh stated that he reached the place of occurrence at 11.00 A.M. and remained there for about an hour. PW-7 HC Paramjit Singh stated that DSP reached the spot at 9.30. A.M. And went back at 11.30 A.M.

Learned counsel also urged that the prosecution has failed to prove the link evidence. From the evidence on record, it is well proved that the sample seal after its use remained with the investigating agency, therefore, the possibility of tampering with the sample seal is not ruled out. The contraband is alleged to have been recovered on 01.01.1998, however, it was forwarded on 05.01.1998 and submitted in the office of Chemical Examiner on 06.01.1998. It is further pointed out that the prosecution has miserably failed to prove the conscious possession of the appellant. It has simply been stated that the accused was seen sitting on a bag of poppy husk on the *kacha* passage of canal minor. In support of his arguments, learned counsel has placed reliance on the following judgements:-

i) *State of Punjab Vs. Balkar Singh and another, 2004 SCC (Criminal) 838;*

ii) *Bikkar Singh Vs. State of Punjab, 2006(3) RCR (Criminal) 16;*

iii) *Sukhdev Singh alias Sukha Vs. State of Punjab, 2006 (1) RCR (Criminal) 4;*

iv) Kaur Singh Vs. State of Punjab, 2007 (2) RCR (Criminal) 630.

On the other hand, learned State Counsel submitted that all the official witnesses have fully supported the prosecution case. The search and seizure was made from the appellant in the presence of PW-3 DSP Rajbachan Singh. He had put his own seal on the samples as well as on the case property. As per report of the Forensic Science Laboratory, EX PJ, the seals tallied with the sample seals, which were found to be intact. He further pointed out that accused was found sitting on the gunny bags, thus, he was having effective control of the gunny bags. He also pointed out that a specific question was put to the accused while recording his statement under Section 313 Cr.P.C. that he was found to be sitting on gunny bags by the police officer. Learned State counsel, therefore, argued that if a person was in effective control of the contraband, he would be deemed to be conscious possession of the same. In support of this, he referred to judgement in "*Avtar Singh and others Vs. State of Punjab"*, *1996 (3) RCC-765.*

On careful consideration of the rival submissions and the facts on record, I am of the view that the prosecution has not been able to prove its case against the appellant and, as such, he deserves acquittal.

It has been proved from the statement of DW-1 Jagtar Singh that the Investigating Officer was holding substantive rank of Head Constable only and was drawing salary in the rank of Head Constable, as is evident from EX D-1 and D-2, respectively. He was holding the rank of

Assistant Sub-Inspector as ORP (Own Rank Promotion), therefore, he was not competent to exercise the powers and duties, as specified in Sections 42 and 67 of the Act within the area of his jurisdiction. Since the Investigating Officer was not a gazetted officer, it was necessary for him to comply with the provisions of sub section 2 of Section 42 of the Act. In a case *"G. Srinivas Goud V. State of Andhra Pradesh", 2005(4) RCR (Criminal) 353*, the Apex Court has observed as under:-

> "*Lastly, the learned counsel for the appellants sought to reply on Abdul Rashid Ibrahim Mansuri V. State of Gujarat, 2000(1) RCR (Crl.) 611 (SC); 2000(2) SCC 513. In this case the search was carried out by a Police Inspector who admitted that he had failed to take down in writing the information as required under Section 42(1) and also he had failed to send a copy of the information to his immediate official superior as required under Section 42(4) of the Act. Therefore, it was necessary for him to comply with the provisions of Section 42. He having failed to do so, the conviction of the accused was set aside by this Court. The facts of the present case are totally different because in the present case the action has been taken by an officer of the gazetted rank."*

From the aforesaid observation, it is evident that the compliance of provisions of Section 42 of the Act are mandatory in nature, if the search

and seizure is made by a non-gazetted officer. In the instant case, the Investigating Officer has failed to comply with the above mentioned provisions, which are mandatory in nature.

Further, the prosecution has not been able to establish conscious possession of the contraband, as prosecution is required to prove the contraband being in effective control of the appellant. Though the accused was sitting on the gunny bags, but the police had failed to further investigate and probe whether the contraband really belonged to him. Even no question was put to him while examining him under Section 313 Cr.P.C. that he was in conscious possession of the contraband or that the contraband belongs to him. It has simply been stated that you were seen sitting on a gunny bag. It is true that the possession has not been defined in the Act, but it has been judicially construed to be conscious and intelligent possession and not merely the physical presence of the accused in the close proximity of the alleged bags. In fact, there are two essential elements of possession i.e. (i) corpus, the element of physical control and (ii) animus or intent with which such control is exercised. It is for the prosecution to establish that the accused was found in conscious and intelligent possession of the contraband.

The Investigating Officer did not comply with the provisions of Section 55 also, as the case property, accused and the samples were not produced before the concerned Illaqa Magistrate for necessary orders. It is true that the non-compliance of provisions of Section 55 of the Act is not mandatory, however, it has been consistently held that if it causes prejudice

to the accused, an adverse inference has been drawn against the prosecution.

Admittedly, in the present case, no independent witness was joined. Even the seal after its use was handed over to HC PW-7 Parmajit Singh. As per his statement, he returned the seal to the Investigating Officer on the same day in the police station. The prosecution has, therefore, not been able to prove that the samples seal and the case property remained as untempered till it remained in the custody of investigating agency. Since, the seal remained with the police officials, the possibility of the samples as well as case property having been tampered with is not ruled out.

Another circumstances, which appears to be quite fatal to the prosecution case is that the prosecution failed to prove that Form No. 29 was prepared at the spot, along with the specimen seal. In fact, the said form was supposed to be deposited with the alleged contraband in the Malkhana, however, as per statement of SHO PW-6, no CFSL form was deposited with him by the MHC. The specimen seal impression used at the time of recovery is to be affixed on it, so that it is deposited with the case property in the Malkhana and forwarded to the CFSL, along with the sample parcels, so that seal impression affixed on the sample parcels are duly compared with the seal impression on CFSL form. The idea behind taking such a precaution is to eliminate the possibility of samples being tampered with. In fact, such safeguards have to be imposed in case of harsh punishment. Harsher the punishment, stricter is the onus on the prosecution to prove its case. The testimony of all the three recovery witnesses suffer from material discrepancies and contradictions. In the absence of any

independent witness having been joined at the time of search and seizure, such discrepancies and contradictions assume greater significance.

From the above discussion, it is clear that the persecution has miserably failed to establish that adequate precaution had been taken by the Investigating Agency to eliminate the possibility of tampering with the samples and also to comply with the other mandatory provisions of the Act.

Accordingly, in view of above discussion, the benefit of doubt has to be given to the accused. The appellant is acquitted of the charge framed against him. The impugned judgement of conviction and order of sentence are set aside and appeal is allowed. The bail/surety bonds, if any, furnished in case appellant was on bail, shall stand discharged.

(NIRMAL YADAV)
JUDGE

September 26, 2007
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